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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

NO. 79-386

JACK H. HARRISON, as Temporary Trustee
of the Linn-Henley Charitable Trust,
Petitioner

vs.

BIRMINGHAM TRUST NATIONAL BANK, a national
banking institution, as Co-trustee of the Linn-Henley
Charitable Trust, SOUTHERN BANCORPORATION
OF ALABAMA, a Delaware Corporation, JOHN C.
HENLEY, III, as Co-trustee of the Linn-Henley
Charitable Trust, and CHARLES A. GRADDICK,
Attorney General of the State of Alabama
Respondents.

**REPLY BRIEF OF PETITIONER IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA**

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Charitable Trust, SOUTHERN BANCORPORATION
OF ALABAMA, ET AL
Respondents.

**REPLY BRIEF OF PETITIONER,
JACK H. HARRISON AS TEMPORARY TRUSTEE
OF THE LINN-HENLEY CHARITABLE TRUST**

The brief of the Respondents, Birmingham Trust National Bank and Southern Bancorporation of Alabama, in opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama, makes the following two untenable points:

1. That the reversal by the Alabama Supreme Court was based upon the common law principles that, in the absence of express authority in the governing instrument, a trustee cannot properly purchase property from itself for a trust it is administering and that a corporate trustee cannot properly invest trust funds in its own stock or in the stock of one of its affiliates; and

2. That Petitioner either abandoned the Federal grounds or that they were not rejected by the courts below.

THE FIRST POINT

The first point overlooks the fact that this was a mere tangential and peripheral phase to the central issue involving (a) the circulation of a fraudulent proxy statement, in violation of the Federal Securities laws, (b) the improper structure of a Merger and Plan of Reorganization, contrary to the Banking Act, (c) the holding of a public auction of unregistered shares of the wrong stock, contrary to the Securities Act of 1933 and the provisions of the Banking Act, (d) the sale of such stock by the Bank to its affiliate at the public auction, in violation of the Securities Act of 1933, the Banking Act and the Regulations of the Comptroller of the Currency, and (e) the fraudulent manipulations on the part of the Respondent Bank and its affiliate, in violation of § 10 of the Act and Rule 10b-5.

(See analysis of Claim II, Appendix A-82).

THE JUDGMENT OF THE TRIAL COURT IS CONSISTENT WITH THE RULINGS OF THIS COURT

The judgment of the trial court below required the Respondent Bank and its affiliate, the "Holding Company", to disgorge the profits they obtained not because the Bank, as co-trustee, failed to purchase the stock for the "Trust", but because they sold unregistered stock to themselves at a public auction, in violation of the Federal Securities and Banking laws, after having deceived the Trust, as a minority stockholder, by the circulation of a fraudulent proxy statement, and after having made a mockery of the second phase of the appraisal process provided under the Banking Act.

This is entirely consistent with the ruling of this Honorable Court in *J. I. Case v. Borak*, 377 U.S. 426, 12 L.Ed. 2d 423, 84 S.Ct. 1555; *Mills v. Electric Auto-Lite*, 396 U.S. 375, 24 L.Ed.2d 593, 90 S.Ct. 616; *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 31 L.Ed.2d 741, 92 S.Ct. 1456, as pointed out on page 26 of our Petition for Certiorari, and the recent case of *Securities & Exchange Commission v. Blatt*, 583 F.2d 1325 (1978) (5th Cir.) in which the court said:

"The trial court acted properly within its equitable powers in ordering Pullman to disgorge the profits that he obtained by fraud. The restitution merely forces the defendant to give up to the trustee the amount by which he was unjustly enriched. *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1104 (2nd Cir. 1978); 2 Moore Federal Practice, 38.24 (2) at 190.5 (1977). The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gains. *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2nd Cir. 1978)."

POINT TWO OF RESPONDENTS IS EQUALLY WITHOUT MERIT

True, the Supreme Court of Alabama chose to ignore the claim of the Temporary Trustee arising out of the violation by these Respondents of the Federal laws, but in the light of the record it is absurd to argue that the Petitioner *abandoned* these Federal grounds.

Before the trial court the Temporary Trustee, after pointing to numerous other violations of Federal laws, contended:

"Secondly, such sale violated the fiduciary duty on the part of the counter-defendants to the 'Trust' in failing to register such stock so as to enable such stock to be

freely sold at public auction, unhampered by the burden resulting from non-registration. Accordingly, the counter-defendants subverted and made a mockery of the appraisal process provided under the Federal Banking laws and are due to compensate the Trust for the loss of the benefits to which it was entitled as a dissenting stockholder." (App.-74)

In the Application for Rehearing filed by Petitioner with the Alabama Supreme Court, beginning at page 21, it was stated:

"Furthermore, while this court pays lip service to the question that a meaningful public sale was required to be had, it fails to even mention the crucial issues submitted in the case showing that the plan of reorganization was so structured that no meaningful sale of the bank stock could have been held. It fails to even mention the illegality, sheer absurdity of holding a public auction of unregistered stock."

The further argument that the Petitioner took no appeal from the trial court's order which rendered judgment in its favor, or the contention that the Petitioner is "foreclosed by the failure of the Temporary Trustee to challenge one part of the decision on the first appeal", is unworthy of further comment, in the light of the fact that Petitioner was appointed Temporary Trustee only following reversal of the cause on the first appeal.

**THE REVERSAL OF THE JUDGMENT MOCKS
THE FEDERAL LAWS AND CONSTITUTES A
BLATANT MISCARRIAGE OF JUSTICE**

The result is that the reversal of this cause by the Supreme Court of Alabama is based upon no rule of law to support it, state or Federal, and constitutes a mere arbitrary and capricious exercise of judicial power bordering upon

the denial of due process. Such a miscarriage of justice in the face of such clear violations of Federal laws should not be allowed to stand without being reviewed by this Honorable Court.

A national bank acting as a trustee should not be permitted to enrich itself as a result of the violations of the laws of the United States. The failure to review this case would serve to encourage national banks acting as trustees to revert to the morals of the marketplace so strongly condemned by one of this court's most distinguished justices in the landmark case of *Meinhart v. Salmon*, 249 N.Y. 458, 164 N.E. 545, wherein the court said:

"Not honesty alone, but the punctillio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * *

Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

When the failure to follow such standard of conduct is accompanied by actual fraud, manipulation, and the violation of so many laws of the United States, how can it be said that there is no substantial Federal question here involved?

**THE SUPREME COURT HAS EITHER DECIDED THE
FEDERAL QUESTIONS INCORRECTLY, OR AVOIDED
THE FEDERAL CLAIMS BY FABRICATING A
SPURIOUS STATE GROUND FOR ITS DECISION**

It is clear that a state court should not be allowed to evade Federal claims by deliberately fabricating spurious state

grounds for its decision. Wright-Miller Federal Practice and Procedure, § 4026, citing the observation of Justice Brennan that:

“Some state courts seem apparently even to be anticipating contrary rulings by the United States Supreme Court and are, therefore, resting decisions on state law grounds to avoid review.”

Here, the Supreme Court of Alabama gives lip service to the duty of the Respondent Bank to conduct a meaningful public auction of the stock which the Trust, as a dissenting stockholder, would have received in exchange for the stock it held in the “Old” Bank. It admits that the Temporary Trustee argued that the Bank can be charged with a breach of its duty by virtue of the improper Plan of Reorganization it elected to pursue. It concedes that § 215 of the Banking Act does not contemplate the exact Plan of Reorganization which the Respondent Bank adopted, and that it was not clear what stock is to be sold at the public auction. (App. A-18, 19)

Instead of recognizing the Federal questions inherent in this departure from the provisions of the Federal Banking Act, in the circulation of a fraudulent proxy statement, in the holding of an impossible, meaningless and spurious sale at public auction of the “New” Bank stock, and in the holding of a public auction of the unregistered stock of the “Holding Company” and the purchase thereof in the name of the Bank’s affiliate, all in violation of the Federal Securities Statutes and Regulations promulgated thereunder, as well as in violation of the Federal Banking Act and the Regulations of the Comptroller promulgated thereunder, it evaded a decision on these questions.

Additionally, it fabricated a spurious ground that “nothing in the law imposes liability on BTNB as co-trustee in

rejecting Henley's proposal to then purchase as an investment for the Trust the various stock it would have received in exchange for the "Old" Bank stock had Henley not voted those shares against the plan of Merger/Reorganization," as if this were the sole issue before the court, or as if this were the sole basis upon which the Judgment of the Trial Court rested.

This ruling incorrectly interprets the rights of the Trust under the very Federal laws mentioned by the Alabama Supreme Court and denies to the Trust the relief granted by the trial court based upon such Federal laws.

What has been said by this Court in *Chapman v. Goodnow's Adm'r.*, 8 S.Ct. 211, 215, 123 U.S. 540, 548, 31 L.Ed. 235, is clearly applicable here:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, and avoids all reference to it, is as much against the right . . . as if it had been specifically referred to and the right directly refused."

THE RATIONALE OF SANTA FE INDUSTRIES DOES NOT APPLY HERE

Finally, we would like to dispel what appears to be implicit in the Respondents' argument that this case might be governed by the principles announced by this Court in *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 474, 97 S.Ct. 1292, 1301, 51 L.Ed.2d 480 (1977).

This is not a case involving a mere breach of fiduciary duty without an element of deception, misrepresentation, or non-disclosure.

This case is governed by the principles announced in *Securities & Exchange Commission v. Blatt*, 583 F.2d 1325 (1978) (5th Cir.) in which the Court distinguished Santa Fe, saying:

"The critical distinction comes from the full and fair disclosure provided by Santa Fe Industries to the subsidiaries' shareholders at an appropriate time. Santa Fe does not control a case in which information that would prove useful to investors is withheld."

While it is true that the complaint bristles with breaches of fiduciary duty on the part of the Respondent Bank, such breaches of fiduciary duty arose from and were accompanied by deception, misrepresentation, non-disclosure, and the violation of the Federal Security laws, within the rationale of *Ute, Superintendent of Insurance v. Bankers Life & Casualty Company* and the Courts of Appeals cases cited by this Court under Note 15 in Santa Fe.

CONCLUSION

The substantial Federal questions here involved were fully presented in the trial court and in the Supreme Court of Alabama. The trial court fully recognized these Federal questions and its judgment is based thereon. The Supreme Court of Alabama in reversing the trial court deliberately avoided the Federal issues thus raised and denied to Petitioners a right claimed under the Federal laws. There was no independent and adequate state ground upon which the reversal was or could be based.

The Respondent Bank and its affiliate have shown nothing in opposition to the Petition for a Writ of Certiorari to

the Supreme Court of Alabama, and the same is due to be granted.

Respectfully submitted,

SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.

By: _____

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PROOF OF SERVICE

I, Morris K. Sirote, attorney for Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the _____ day of October, 1979, I served copies of the above and foregoing Reply Brief of Petitioner in Support of Petition for Writ of Certiorari to the Supreme Court of Alabama, by mailing and depositing same in a United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. Lee C. Bradley Jr. and Macbeth Wagon, Jr., 1500 Brown-Marx Building, Birmingham, Alabama 35203, attorneys for respondents Birmingham Trust National Bank and Southern Bancorporation of Alabama; to Hon. Donald B. Sweeney, Jr., 601-09 Frank Nelson Building, Birmingham, Alabama 35203, and James W. May, 2154 Highland Avenue, Birmingham, Alabama 35205, attorneys for John C. Henley, III, and to Hon. Jim O'Kelley, 1927 1st Avenue North, Birmingham, Alabama, special counsel for the Attorney General of the State of Alabama.

It is further certified that all parties required to be served have been served.

This the _____ day of October, 1979.

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